

**Louis A. Weiss Memorial Hospital and Barbara Zimmerman.** Case 13-CA-32785

October 31, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 16, 1997, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a memorandum in answer to the Respondent's exceptions and brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Louis A. Weiss Memorial Hospital, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

*Emilie Schrage, Esq.*, for the General Counsel.  
*James N. Kosmond, Esq.* and *Charles E. Whalen, Esq.*, both of Chicago, Illinois, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Chicago, Illinois, on June 12-14, 1995, pursuant to a charge filed by Barbara Zimmerman on September 13, 1994, and amended on May 17, 1995, against Respondent Louis A. Weiss Memorial Hospital; and a complaint issued on November 15, 1994. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating and maintaining a rule which forbids employees to discuss union-related matters with other employees, and by threatening employees that other employees were selected for discharge because of their union activities; and violated Section 8(a)(1) and (3) of the Act by permanently laying off employee Bar-

bara Zimmerman because of her activity in support of the Warehouse, Mail Order, Office Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, AFL-CIO (the Union).

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the posthearing briefs filed by counsel for the General Counsel (the General Counsel) and the Respondent, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent is a nonprofit corporation with an office and place of business in Chicago, Illinois, where it operates a hospital providing inpatient and outpatient medical care. During the year preceding the issuance of the complaint, the Respondent derived gross revenues in excess of \$250,000, and purchased and received at its Chicago, Illinois facility goods valued in excess of \$50,000 directly from points located outside Illinois. I find that, as the Respondent admits, it is engaged in commerce within the meaning of the Act, and that exercise of jurisdiction over its operations will effectuate the policies of the Act.

**II. THE UNION'S STATUS**

The Union is a labor organization within the meaning of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

*A. Background; Alleged Interference, Restraint, and Coercion*

**1. Events before the May 1994 representation election; alleged unlawful statements by Supervisor Jim Mitchell about May 7, 1994**

Barbara Zimmerman was in the Respondent's employ between July 1970 and August 31, 1994. Although in November 1993 her job title changed from "diet assistant" to "diet technician" and she received a pay increase, her job duties did not change.

On November 21, 1991, the Union filed a representation petition seeking a unit of about 175 service and maintenance employees on the Respondent's staff. On May 1, 1992, the Regional Director directed an election in a unit larger than that sought by the Union. By letter dated May 21, 1992, the Respondent was advised that the Union had withdrawn its petition.

On an undisclosed date about late 1991 or early 1992, the Union was certified as the bargaining representative of a unit of 16 or 17 plant operations and maintenance employees. After about 18 months of unsuccessful negotiations on a contract, the Union walked away.

About the fall of 1993, Zimmerman and four or five other dietary employees engaged in a discussion, in the employee cafeteria, about when and if the Union was coming back. During this discussion, Zimmerman offered to telephone the Union and ask about this matter. When she did so, Union Representative Cassandra Davis said that the Union would come back if one of the Respondent's employees asked it to. Two days later, Davis met with Zimmerman in the hospital

lobby. Davis gave Zimmerman a number of blank union authorization cards, and told her to distribute them among her fellow employees on her own time and not to take away from her work or her responsibilities. During the next 2 weeks, Zimmerman distributed about 55 blank cards among her fellow employees, and received about 60 signed cards, some of them from employees who had been directly solicited by Davis during a meeting arranged by Zimmerman. Then, Zimmerman gave Davis the signed authorization cards. During the period when Zimmerman was distributing union authorization cards, she was told by Food Service Supervisor Fannie Smith (admittedly an agent of and statutory supervisor for the Respondent) that she had heard rumors that Zimmerman had union cards and that she had better be careful.<sup>1</sup>

On dates not clear in the record, but inferentially about early April 1994, the Union filed a representation petition seeking a unit of the Respondent's service, maintenance, and business office clerical employees, and executed with the Respondent a stipulation for a consent election in that unit. Between the fall of 1993 and the representation election on May 12, 1994, Zimmerman attended about 15 union meetings (where attendance varied between 10 and 30), and reported about them to a number of her fellow employees. Also, during the 2-month period before the election, she distributed to her fellow employees about 12 red, white, and blue oval union decals about 4 inches high and about 5 inches wide, kept on her desk a mug with union insignia, and hung over her desk a shiny white plastic union button about 6 inches in diameter, with red and blue printing. Before the election, nobody asked her to remove the mug or the union button from her desk.

Carol House, who is the Respondent's vice president senior executive for support services, credibly testified that the University of Chicago Hospital (the UCH) is an alliance of which the Respondent is a part; but that the Respondent is a separate corporation from the UCH, must pay the Respondent's salaries and other expenses from the Respondent's own revenues, and "need[s] to prove that we are worthy of that affiliation in the sense that we have to be able to sustain our sales and our own existence." On April 20, 1994, Zimmerman composed, and during the next 2 days gave to about 12 of her coworkers, an anonymous typewritten letter (signed merely "A very concerned coworker") which stated that management had been telling the employees that a union was not necessary, but that the unionized employees at hospitals at least allegedly affiliated with the Respondent (namely, the UCH and its branches) had given their employer a "world renown [sic] reputation." The letter further said, "All we want here at Weiss is to be treated the same as our coworkers at the other branches. We are all doing the same job and responsibilities . . . why must we keep begging to be treated equal to our coworkers?"<sup>2</sup> About May 1, Zimmerman tele-

phoned the UCH and asked what the Respondent's relationship was to the University of Chicago. She received the reply that the Respondent was one of the UCH hospitals. She asked who Dean Harrison was at the Respondent. She was told that he was the Respondent's president, and that Ralph Muller was president over all the hospitals. Zimmerman said that the Respondent had hired a new executive officer. She was told by the person on the telephone that he did not know whether this new executive would be Harrison's equal or supervisor at the Respondent.

About May 7, a meeting attended by about 15 employees (including Zimmerman) and Jonathan Kirk (the Respondent's operations manager, food and nutrition services, who is admittedly an agent of and supervisor for the Respondent) was conducted by Robert True, who is the Respondent's director of support services and is admittedly an agent of and supervisor for the Respondent. Giving each employee a key to what looked like a pirate's treasure chest filled with fake money, he said that the Union was only there to take all of the employees' money, and that they held the key to the chest. In addition, he lit some "trick matches" and said that by joining the Union, the employees were just letting their money go up in smoke. True said that the Union wanted a lot of money. Zimmerman asked what was a lot of money. He said \$12 a month. Zimmerman then asked how many employees in the room blew that amount of money a week or a month on lottery tickets "or whatever and we don't know what we have done with our money." Zimmerman asked what the Respondent's connection was with the UCH. True said that both institutions were hospitals, but that there was really no connection. Zimmerman asked whether there had been any unions at the UCH, and explained that she had heard there had been unions there for many years, the employees had not gone on strike or had any problems, and they had many benefits. She said that the employees of the Respondent merely wanted the same benefits and treatment that the employees had at the UCH. She asked, "[W]ho Dean Harrison was to the University of Chicago Hospital." True said that Dean Harrison was in charge at the Respondent's hospital and there was no relationship to the UCH. Zimmerman said that a few days earlier, she had called the UCH and asked who Dean Harrison was, and that she had been told that Harrison was president at the Respondent's hospital, but that Ralph Muller was in charge of the University of Chicago Hospitals, and that the Respondent's hospital did indeed belong to the UCH. True said that McDonald's on Foster was different from McDonald's on Lawrence. Zimmerman said that problems with McDonald's could be corrected by going to the corporate office and getting them corrected, and asked whether the Respondent's employees were supposed to go to the UCH for correction. True reddened, and turned his back to Zimmerman.

A letter to the Respondent's employees dated April 26, 1994 (inferentially, after the meeting just described), from "Dean M. Harrison/President and Chief Executive Officer Re: The Weiss/UCH" stated, "[A]mong other things, that the Respondent and UCH were two separate corporations with primary service areas which do not overlap." The letter went on to say:

UCH and Weiss offer significantly different services. UCH is a 659-bed academic medical center which treats

<sup>1</sup>This finding is based on Zimmerman's testimony, which for demeanor reasons I credit over Smith's testimony that she saw Zimmerman passing out union cards in the kitchen during working hours, and said to her, "[W]ill you please do it during your break time because they are working." Smith went on to testify that thereafter, Zimmerman refrained from passing out union cards while the employees were working.

<sup>2</sup>This letter was not received into evidence to show the truth of the contents.

the most difficult and complex cases. Patients come to UCH from around the world because they are unique in providing such high-intensity care. As a teaching hospital, UCH trains over 600 residents and fellows every year and conducts basic science research. Weiss, on the other hand, is a 225-bed community hospital. It is important for Weiss to be part of the UCH system, especially as the nation moves forward with health care reform, because we gain some significant advantages. We [complement] each other as part of a health care system, but we are not the same corporation.

Finally, because the differences—in corporate structure, geographic diversity, intensity of service and volume—between UCH and Weiss are so great, Weiss and UCH have significantly different charge and expense structures. When we measure the success of our Hospital or calculate the market average for compensation, we look to hospitals comparable in size, location and the type of services provided. Grant, Swedish Covenant, St. Joseph's and Ravenswood are comparable to Weiss. UCH, on the other hand, is appropriately compared with other large academic medical centers like Northwestern or Rush-Presbyterian-St. Lukes. We are confident that our compensation and benefit plans compare favorably to those of our real competitors.

We are proud to be a community-based teaching hospital, serving the northside, effectively competing in our particular market and a part of the UCH health system.

About May 7, Executive Chef Jim Mitchell (admittedly an agent of and a supervisor for the Respondent) saw Zimmerman standing near his departmental bulletin board. Immediately before seeing her there, he had seen that the bulletin board bore only his weekly menus and the hospital news letter. Immediately after her departure, he saw that a union flier was also posted there. He sought her out and told her that the bulletin board was strictly for the hospital newsletter and his menus and nothing else; she did not reply. Immediately thereafter, Mitchell approached Administrative Dietician Carol Schwartz, Zimmerman's immediate superior, who is admittedly an agent of and supervisor for the Respondent. Mitchell said that Zimmerman had posted "a union notice or something" on the departmental bulletin board, and that the only things to be posted there were his menus and the hospital news letter. He asked Schwartz to counsel Zimmerman about the matter. Later that same day, Schwartz told Zimmerman that Schwartz had a message for Zimmerman from Mitchell. Zimmerman asked what the message was, and Schwartz stated that Mitchell did not want Zimmerman to put any more union "stuff" on "his" bulletin board. Zimmerman replied that she did not know what Mitchell was talking about. Still later that day, while Zimmerman was engaging in a work-related conversation on the telephone in the diet office, Mitchell came into the diet office, hit her on her back, and (using a scatological expression) asked if she was annoyed because of his message. She told him that she would have to talk with him later, because she was on the telephone. After she got off the telephone, she approached him and told him never to hit or touch her again. Then, she asked him why he thought that she was the one that "put the stuff up on his bulletin board." He said that he knew that

she was "into this union stuff" and not to put it on "his" bulletin board. She said that she did not know what he was talking about, because she had not seen it or done it and did not know who had done it. He told her to stay away from "his" cooks, not to talk to "his cooks" about the "union stuff," and not to bring any of that "union stuff" to them. She said that she had known them longer and better than Mitchell had. Mitchell said that he and Zimmerman had had a good working rapport, up until she got involved with the Union, which he described in scatological terms.<sup>3</sup>

The May 1994 edition of a newsletter which the Respondent periodically distributed to its employees "encouraged" the eligible employees to vote in the forthcoming representation election. The newsletter went on to say:

Administration continues to believe it can be most effective if it works directly with you and not through a third party. Union contracts vary a great deal depending on the size, location, type, and economic health of an institution. [The Union] cannot guarantee anything except dues collection and being your sole representative.

The polls for the representation election conducted on May 12 were open between 6 and 9 a.m., and between 2:30 and 5:30 p.m. The Union had two observers during each session—Zimmerman during both sessions, and two other employees during one each. Between these two sessions, Zimmerman performed her regular job duties. While she was doing so, about 15 different employees brought her various copies of a letter which (they told her) had been given to them early that morning. Although identical in content, each of the letters began "Dear" followed by the employee recipient's first name. The letters urged the employees to vote against the Union, and were signed by "Dean M. Harrison/President and Chief Executive Officer."<sup>4</sup> When the first employee gave her copy of the letter to Zimmerman, she asked Supervisor Smith where Zimmerman's letter was. Smith replied, "Well, we know where you stand with the Union, so what does it matter?"<sup>5</sup> Zimmerman never did receive such a letter. She had been acting as an observer in the polling area (the auditorium) when the letters were distributed; Kirk testified that this was why she never received a letter, and that to his "recollection" the letter with her name on it was taken back to "human resources," even though her desk was physically located in the department.

## 2. Events after the May 1994 representation election

The Union lost the May 12 election by a vote of 256 to 151, with 17 nondeterminative challenges. So far as the record shows, the Union filed no objections to the election.

<sup>3</sup> My findings as to this Zimmerman-Mitchell conversation are based on her testimony. For demeanor reasons, I do not credit his testimony that he did not hit her on the back, that he did not tell her that she must be really annoyed about the message he sent her, and that their contact consisted merely of a harsh-voiced reproach by Zimmerman for his having gone to Schwartz, to which he reacted by just walking away.

<sup>4</sup> The letters were reproduced on letterhead stationery which at least arguably identifies the Respondent as one of "The University of Chicago Hospitals."

<sup>5</sup> My findings as to this conversation are based on Zimmerman's testimony. For demeanor reasons, I do not credit Smith's denial.

However, on May 13, 1994, the Union filed a charge against the Respondent, alleging that about May 12, the Respondent had "interfered with, restrained, or coerced employees in the exercise of rights guaranteed in Section 7." Thereafter, Zimmerman paid a visit (unaccompanied by any other employees) to the Board's Regional Office, and gave a statement. On June 13, 1994, the Regional Office dismissed this charge because of "insufficient evidence." So far as the record shows, the dismissal was never appealed. Also, after the election, Supervisor Kirk asked Zimmerman to remove her union mug from her desk. She did so, and also removed the union button which she had hanging above her desk.<sup>6</sup>

Meanwhile, on May 13, 1994, Zimmerman sent a letter to Ralph Muller. "University of Chicago Hospital/5841 S. Maryland Ave./Chicago" (the Respondent's address is 4646 N. Marine Drive, Chicago). The letter stated on its face that a courtesy copy was being sent to the Union. The letter stated, among other things, that Zimmerman believed she and others had received insufficient and inaccurate information from Respondent Weiss in connection with the union campaign, stated that she had been told Muller was Harrison's supervisor at Weiss, and asked Muller to explain "who you are and what you are to me and Weiss." By letter to Zimmerman dated June 3, 1994, with courtesy copies to Harrison and Muller, House stated that Harrison had forwarded to her a letter which Zimmerman had sent to Muller. The letter denied as to the Respondent's antiunion campaign certain factual allegations contained in the letter, but did not discuss any relationship between the Respondent and UCH.<sup>7</sup>

On a Wednesday in late June 1994, Mitchell approached Zimmerman while she was in the diet office, and told her to leave the office and talk to him. Zimmerman said that if he had to talk to her, he would have to talk to her in the diet office. Mitchell said that he was tired of "his supervisors" coming and complaining to him about Zimmerman and the Union. She asked who "his supervisors" were. Mitchell said, "Well, I am just here to talk about it." Zimmerman again said, "I want to know who your supervisors are." Mitchell named Relief Supervisor Ceile Davis (not to be confused with Union Representative Cassandra Davis) and Smith, neither of whom reports to Mitchell. Zimmerman said that she and Mitchell should get Kirk and get the matter straightened out, because she had no idea what anybody was talking about. Then, having ascertained by telephone that Kirk, Smith, and Ceile Davis were all off that day, Zimmerman left notes on Smith's and Davis' timecards stating that Zimmerman needed to talk to them.

On the following Saturday, Smith and Davis told Zimmerman that they had received the message that Zimmerman was looking for them in regards to Mitchell. Zimmerman said that she did not understand what was going on. Smith and Davis said that they did not understand what was going on either, because they had not discussed anything with Mitchell concerning Zimmerman and the Union and did not know why he was dragging them into the conversation.

<sup>6</sup>This finding is based on her testimony. Kirk testified that he did not remember one way or the other asking her to remove her union button and mug, but that "it remained until the end of her employment." To the extent that their testimony is inconsistent, for demeanor reasons I credit her.

<sup>7</sup>House's letter was typed on the same style of letterhead stationery described supra at fn. 4.

Later that Saturday, Kirk telephoned Zimmerman, told her that he had received a telephone call from Davis or Smith about the situation with Mitchell, and asked Zimmerman to explain what had happened. Zimmerman said that Mitchell was "demanding" that she exit the diet office, and that Mitchell had told her that he was tired of his supervisors' complaining to him about her and the Union. She asked Kirk whom Mitchell supervised. Kirk said that Mitchell was only over the cooks. Zimmerman said that she was afraid of Mitchell and did not want to deal with him,<sup>8</sup> and asked Kirk to come to the hospital and handle the situation; Kirk said that because of a family emergency, he could not go to the hospital. Zimmerman requested that any dealings between her and Mitchell go through either Kirk or Schwartz. Kirk agreed that this arrangement would be followed. Kirk told her that if she felt scared or threatened, she should not hesitate to call "security." She asked him to take care of the situation on the following Monday; he said that he would. Zimmerman never again discussed the matter with Kirk, or complained to him about Mitchell.

My findings as to the diet-office conversation between Zimmerman and Mitchell are based on her testimony, which is indirectly corroborated by the testimony of Smith and Davis (as well as Zimmerman) about the notes Zimmerman left on their timecards and the ensuing conversations—incidents otherwise unexplained in the record. For these and demeanor reasons, I do not credit Mitchell's denial that such a conversation took place.<sup>9</sup>

My findings as to the Zimmerman-Kirk conversation are based on a composite of credible parts of their testimony. Because Kirk admittedly had a very poor recollection of this conversation, I credit her testimony that he called her, rather than his testimony that she called him. However, I regard this issue as immaterial.

#### *B. Zimmerman's Termination; Alleged Additional Interference, Restraint, and Coercion*

Zimmerman was on vacation between August 29 and September 11, 1994. When she reported to work at 5 or 5:30 a.m. on September 12, Kirk told her that he hated to tell her this but that there was a lack of work, that there had been a cutback in staff, that her position had been eliminated, and that he had had nothing to do with it.<sup>10</sup> When Zimmerman

<sup>8</sup>Zimmerman testified that Mitchell had "bothered" her for about a year, regarding the Union and because "he didn't appreciate me coming over and helping the cooks out and being around the cook's area." Before this conversation with Kirk, she had complained to a number of fellow employees about Mitchell's conduct.

<sup>9</sup>The testimony of Supervisors Smith and Davis that they never complained to Mitchell about Zimmerman is, of course, consistent with Mitchell's testimony that he never received, or told Zimmerman about, any such complaints. However, if credited, this testimony by Smith and Davis is also consistent with the inference that in order to exert pressure on Zimmerman, he was using untrue assertions that other supervisors had complained to him about her.

<sup>10</sup>My finding that he told her this is based on her testimony. For demeanor reasons, I do not credit Kirk's denial that he told her she was laid off for lack of work and he had nothing to do with it. Also, for demeanor reasons, I do not credit his testimony that she asked him what was new; he said that they needed to talk; she asked what he meant; he said that "since we are talking about it, your position has been eliminated" and that "we needed to go to Ruth Descher"

*Continued*

asked about receiving her vacation pay, he told her that she should speak to Ruth Descher, whom Kirk testimonially described as "our human resource contact." Kirk said that Zimmerman could either work until the Human Resources Department opened up at 9 a.m., or leave and come back later. Zimmerman elected to leave. When she went to Descher later that day, Descher had her sign various termination papers and gave her the following letter, dated August 31 and over House's signature:

Dear Colleague:

Louis A. Weiss Memorial Hospital recently made the decision to reduce our work force. The net result is that some of our valued employees will be seeking new employment opportunities.

Barbara Zimmerman . . . was employed by Weiss between 07/13/70 and 08/31/94, most recently as a Diet Technician.

Should your organization have employment opportunities in a related area we hope you will consider this applicant.

Descher told Zimmerman to make 50 copies of this letter, so that if she applied for a new job she could use one of them instead of having her prospective employer call the hospital.

On October 4, Zimmerman visited the hospital to pick up her checks. After having lunch with some of the dietary staff, she walked into the kitchen to see some other employees whom she had not seen in the dining room. She was preceded into the kitchen by Mitchell, who remarked, "Oh, is Barb here to sell that union [scatological term] again?"<sup>11</sup> Then, he saw her talking to cook Johnny Chaney. Mitchell told Chaney that he had work to do, and asked Zimmerman to leave the kitchen. After repeated urging, she did so.

The lunch period of food service employees, some of whom serve lunch to the patients, is scheduled prior to 11:30 a.m., when lunch service for the patients begins. During the period which included September 12, 1994, employees Marilyn Thomas and Joe Ruffing, and Supervisors Davis and Smith, frequently ate lunch together in the hospital dining room. Thomas testified to the following effect: On September 12, she, Ruffing, Davis, and Smith ate lunch together. While they were all seated at the table, Smith told Davis that one of the reasons why Zimmerman was laid off was her involvement with the Union. The conversation at the table lasted at least 15 minutes, but this was the only statement Thomas heard before leaving the group to resume her duties, and Zimmerman had not been discussed before Smith made this remark.

Because the remarks testified to by Thomas could not have consumed 15 minutes, because Thomas' testimony fails to explain why the subject of Zimmerman's termination came up at all, and after considering the witnesses' demeanor, I ac-

in "human resources"; and Zimmerman chose to talk to Descher later that day.

<sup>11</sup> This finding is based on Zimmerman's testimony. For demeanor reasons, I do not credit Mitchell's denial.

cept the testimony of Davis and Smith that this conversation never took place.<sup>12</sup>

### *C. Evidence Regarding the Respondent's Explanation for Zimmerman's Termination*

#### 1. Introduction

Respondent contends that Zimmerman's termination was part of a hospitalwide reduction in force effected for economic reasons, and that she was selected for termination because of her relatively low score on reduction-in-force (RIF) ratings which Kirk prepared for employees in her job classification (diet technician). Although the General Counsel's posthearing brief states (p. 18) that she "does not dispute the Respondent's assertion that the hospital-wide reduction in force was essential to its fiscal survival," the General Counsel claims that Zimmerman's union activity was at least one of the reasons why she was included in that reduction.

#### 2. Consulting firm's efficiency recommendations; the early retirement incentive program

In early July 1994, the Arthur Andersen consulting firm, which the Respondent had engaged in 1994 to make suggestions about improvements in efficiency, advised the Respondent that a hospital of its size should be staffed by about 815 full-time equivalents (FTEs), whereas the Respondent currently employed 974 FTEs. By letter to the Respondent's staff dated July 15, 1994, the Respondent stated, in part, "[W]e have offered an early retirement incentive program to . . . employees who have at least five years of vested service with the Hospital and are 55 years of age or over. The eligible employees received their benefit packets today and will have 45 days [that is, until August 29, 1994] to consider the offer." House credibly testified that the Respondent decided to offer this "enhanced" early retirement incentive program in order "to minimize the impact of the right sizing and therefore the number of people that we would have to lay off for the right sizing . . . we had a target number in mind . . . that we wanted to reduce by. So obviously . . . if people took early retirement, we could reduce that number that we would have to eliminate through a right sizing."

About 116 employees received this offer. Thirty-two employees (one of whom was replaced) took advantage of this offer. So far as the record shows, this offer was not available to any of the Respondent's diet technicians, including Zimmerman.

#### 3. Forms filled out in connection with Zimmerman

A memorandum captioned "Rightsizing Process" and dated August 9, 1994, from House to "Corporate Staff," which did not include True or Kirk but did include Beverly Tuck (Respondent's senior executive for support services), described the process to be used in determining the identity of the employees to be laid off. House credibly testified that at the time this memorandum was issued, the Respondent was not positive about how many people would have to be

<sup>12</sup> At the time of the hearing, Ruffing was no longer working for the Respondent, and he did not testify.

laid off, partly because the Respondent did not yet know how many of the 116 people who had been offered early retirement would accept the offer, and partly because the Respondent did not yet know where part-time and full-time employees would be slotted in the rankings and ratings lists (which lists are explained, *infra*). Attached to the memorandum was a packet of forms which "Managers" were to use in preparing RIF ratings, as well as rankings, for each of the employees under them. The packet forwarded to Kirk in early August 1994 (with a cover letter dated August 8) for the purpose of preparing an RIF rating for each of the employees under him, included as to the three diet technicians the four most recent Performance Planning and Appraisal (PPA) ratings for Corazon Sueno (referred to in the record as Cora), and the three most recent PPA ratings for Zimmerman and Carolyn Hargrove. The two most recent of these PPA ratings (namely, the most recent PPA ratings for Hargrove and Sueno) had been prepared by Schwartz and approved by Kirk and (perhaps) True; the others had been prepared by her predecessor as administrative dietitian. Zimmerman's PPA ratings were mostly higher than those of Hargrove and Sueno.<sup>13</sup>

Employee	PPA Rating Issued in 1991	PPA Rating Issued in 1992	PPA Rating Issued in 1993	PPA Rating Issued in 1994
Hargrove	—	60	58.75	72.5
Sueno	85	66.25	71.25	86.25
Zimmerman	98.75	60	73.75	—

The RIF rating forms to be filled out called for a separate rating in each of six categories—quality of work, quantity of work, guest relations, job skills, attendance, and "job related experience/education." The rating instructions stated, in part, that the PPAs "*should be considered*, but should not be the sole consideration" (emphasis in original) because the PPA ratings "were conducted with the employee's continued employment in mind; not termination"; because there had been no need to compare similarly situated employees; and because "New ratings are necessary to evaluate how employees perform any identified new, as opposed to former, duties."<sup>14</sup> The RIF rating forms set forth a mathematical formula for rating attendance, based on the total number of "occurrences within twelve months." Kirk testified that the ratings for the three diet technicians, which bear the date of August 14 after his signature, were prepared by him without input from anyone else, and that at the time he prepared these ratings, he did not know how many diet technicians would be laid off. The documents received in evidence as the RIF ratings produced by Kirk show the following:

<sup>13</sup> The ratings are as follows:

<sup>14</sup> The RIF rating forms are different from the PPA forms, which call for ratings as to job functions. A "guest relations" page on the PPA forms is separate from the job functions page and calls for a check before "Exceeds expectations," "Meets expectations," or "Fails to meet expectations"; a check mark before this last entry will cause the delay of a merit increase.

	ZIMMER- MAN	HAR- GROVE	SUENO
Quality of Work	8	6	6
Quantity of Work	8	8	8
Guest Relations	4	8	8
Job Skills	8	8	6
Attendance	4	2	10
Job-Related			
Experience/Education	2	2	3
Totals	34	34	41

Kirk testified that as to the three diet technicians, he was closely familiar with their quality of work, quantity of work, job skills, and the categories set forth on the RIF rating forms. As to the category "Quality of work," Kirk gave Zimmerman a higher rating than the other two diet technicians "primarily" (he testified) because her work "was consistent and accurate, more than the other two individuals." As to the category "Job-related experience/education," Kirk gave a higher rating (3) to Sueno than to Zimmerman and Hargrove (2). Kirk noted on the respective forms that Sueno was a "Philippine's [sic] Registered Dietician w/College Degree"; and that Zimmerman and Hargrove had "No formal training/education." Although Zimmerman does not have a dietetics degree of any kind, Supervisor Smith credibly testified that Zimmerman had obtained additional training in the dietary field. There is no evidence that Kirk tried to investigate Zimmerman's (or Hargrove's) education before rating them, although the August 9 "Rightsizing Process" memorandum had stated (emphasis in original), "It is important to determine the educational background of all employees before rating any employee on *education*. If this information is unavailable for one employee, it should not be used for any employee you are evaluating."<sup>15</sup> Kirk testified that "[b]ased on formalized education in the field, [Sueno] scored higher [than Hargrove and Zimmerman] because [Sueno] has a four year degree in the area of dietetics." He further testified that as to the "Job-related experience/education" factor, "we only looked at the formal training in the field of nutrition or dietetics [because what] we needed on the staff . . . is someone who can work multi-faceted. Someone who has more formal education can do more things as opposed to someone who doesn't, especially in the clinical aspects." When the General Counsel pointed out that Kirk had rated Sueno lower than either Zimmerman or Hargrove as to the factor "Job skills,"<sup>16</sup> and asked what Sueno would be able to do on the

<sup>15</sup> The "Diet Technician" job description effective in June 1994 required a high school diploma, and "Associate Degree in Nutrition highly recommended." Kirk testified in June 1995 that "the degree" (perhaps referring to a 4-year degree) is not a requirement for diet technicians. The Respondent's job description for diet technician effective in May 1995 lists an "Associate Degree in Nutrition" as one of the "Minimum Entry Qualifications." However, Kirk testified in June 1995 that the diet technicians were performing very few tasks "up" the line from those which they had performed before the August 1994 terminations.

<sup>16</sup> On Zimmerman's and Hargrove's rating forms, Kirk had noted, "Picks up new skills & instructions easily." On Sueno's rating forms, he noted, "Good ability to learn new skills, positive to change."

job that was a requirement of the job because of her degree, Kirk replied, "She would be able to analyze different clinical issues because of training more than someone who did not have the training [such as specific] doctor requirements on diets. I am not a clinician so I can't tell you exactly a specific instance." The August 9 instruction sheet directed that the ratings and rankings, including the second-level review, be completed by Friday, August 12. True reviewed the diet technicians' RIF ratings with Kirk, who testified that True did not change the numbers; although still part of the Respondent's management at the time of the hearing, True did not testify. Both Kirk's and True's signatures on the diet technicians' ratings are dated Sunday, August 14, 1994. The date of August 16 appears after True's signature on the ranking sheet which includes their names.

4. The decision by August 23 to terminate two diet technicians, including Zimmerman

As previously noted, employees who had been offered early retirement had until August 29, 1994, to accept such an offer. House credibly testified that until the Respondent had the results of the early retirement incentive program, no determination could be made as to how many employees would be lost in each specific category. On an undisclosed date which was a weekday between Wednesday, August 17, and Tuesday, August 23, Kirk told Administrative Dietician Carol Schwartz, an admitted supervisor who was his immediate subordinate, to meet him that afternoon in True's office. During this conference, True said that for budgetary reasons the Respondent was going to have a big layoff, that each employee had been evaluated according to certain criteria, that Sueno (the diet technician with the best score) would be kept, and that the other two (Zimmerman and Hargrove) would be lost. Schwartz was shown the RIF ratings of the three diet technicians which Kirk had prepared and he and True had signed; she expressed agreement with these ratings. Kirk testified, in effect, that after Schwartz had reviewed these ratings, they were sent to "human resources."<sup>17</sup> For reasons unexplained in the record, nobody's signature appears in the blanks calling for the approval of "human resources" on Hargrove's or Sueno's RIF rating sheets. A document captioned "Ranking," and listing Sueno, Hargrove, and Zimmerman in that order but with the notation that Hargrove and Zimmerman were "tied—34" (their total ratings scores), contains the notations that it was prepared by

True on August 16, received the approval of Beverly Tuck as "senior executive" on August 23, and received the approval of House as "human resources" on August 29.<sup>18</sup> House credibly testified that after completing the ranking of employees, management did not yet know exactly how many employees would be lost in each specific category, because "that determination had not been made yet . . . because we didn't have the results of the early retirement incentive program." Also, she credibly testified that by offering some full-time employees part-time jobs, and by failing to fill some vacancies, the Respondent reduced the number of full-time employees who would be laid off.

Zimmerman's termination letter is dated August 31, 1994, and gives this as her termination date. Hargrove was terminated during the first few days of September. House testified that if the Respondent had terminated only one diet technician, Zimmerman would have been retained because her RIF rating score equaled Hargrove's and Zimmerman was senior to Hargrove. Sueno, with the highest RIF rating, was the only retained employee with that job classification.

When asked who decided that two diet technicians would be included in the terminations, House testified that she did not decide and did not know who decided this, but that she assumed this decision was made by Kirk, True, and/or Tuck. Kirk testified, in effect, that the decision was not made by him (see p. 454, LL. 18–23 of the transcript). True and Tuck did not testify, nor was their absence explained. Taken together, the testimony of Schwartz and Kirk indicates the existence of certain facts which might reasonably lead to a determination to terminate diet technicians rather than dieticians or food service workers—namely, that most or all of the functions performed by technicians could be performed by dieticians or food service workers, that food service workers are paid substantially less than technicians, and that the Respondent had to retain enough dieticians to perform work which must be performed by a licensed dietician. However, nobody testified that these or any other specified reasons motivated the decision to diminish the number of technicians, or to terminate two rather than only the technician (Hargrove) who was lowest on the "ranking" list.

My findings as to the substance of the Schwartz-Kirk-True conference are based on Schwartz' uncontradicted testimony. My findings as to the date are based on: (1) Schwartz' testimony that during this conference, she was shown Zimmerman's RIF rating sheet (R. Exh. 15), on which Kirk and True had dated their signatures Sunday, August 14; (2) testimony by Schwartz which is susceptible to the inference that during this conference she was shown the diet technicians' "ranking" sheet, which True signed with an August 16 notation (R. Exh. 18); (3) Kirk's testimony that he showed Schwartz the ranking and/or the rating sheets after True had reviewed them (see *supra*, fn. 17); (4) the evidence that Schwartz was not ordinarily scheduled to work on weekends;<sup>19</sup> (5) House's testimony that after being signed by True, the forms were reviewed by Tuck, whose approval of the ranking sheet (R. Exh. 18) is dated August 23; and (6) Kirk's testimony that

<sup>17</sup> The difference between "ratings" and "rankings" is discussed *infra*.

On direct examination, by company counsel, Kirk testified as follows:

Q. Did [Schwartz] review these ratings?

A. Yes she did.

Q. What did she say?

A. She concurred with our ranking of the individuals.

Q. After that, where were these sent?

A. To human resources.

Q. And that would be, the ranking would be the Respondent's Exhibit 15 [Zimmerman's RIF rating sheet], correct?

A. Yes.

. . . .

Q. Did you take any other factors in the consideration, other than what you testified to, in making these evaluations or rankings?

A. The evaluation form was the sole consideration.

<sup>18</sup> This "ranking" document also bears, with an August 23 date, a semilegible signature which may be the signature of Ruth Descher, a member of the Respondent's "human resources" department who did not testify.

<sup>19</sup> As discussed *infra*, she dated this conference as Thursday, August 4; Friday, August 5; Monday, August 8, or Tuesday, August 9.

after Schwartz orally approved the rating sheets and perhaps the ranking sheet, they were sent to “human resources,” whose approval on Zimmerman’s rating sheet is dated August 23 (R. Exh. 15).<sup>20</sup> I conclude that Schwartz was mistaken in dating the conference as August 4, 5, 8, or 9, although such testimony does suggest that the conference occurred early in the August 16–23 time frame. True did not testify. Kirk was not asked in terms about this conference; when asked when he first discussed the reductions in his staff with True at length, Kirk replied, “That would have been prior to, somewhere around that, the final receipt of the ranking.” The only filled-out form marked “ranking” in the record states that it was approved by True on August 16, approved by Tuck on August 23, and signed by House on August 29 (R. Exh. 18); as previously noted, the Respondent gave August 31 as Zimmerman’s termination date. After testifying on direct examination about a conversation with Zimmerman where she described her at least perceived problems with Mitchell, and accepting company counsel’s suggestion that this conversation occurred in late June, Kirk testified (still on direct examination) that it was “somewhere in this time frame” when he learned that two diet technicians were going to lose their jobs. Immediately thereafter, when company counsel asked, “Sometime perhaps in the middle of or late August?,” Kirk replied, “[Y]es.” In view of the uncertainties and internal inconsistencies in this testimony by Kirk about dates, I regard it as valueless in fixing either the dates of these discussions with True about the reductions in staff, or the date when Kirk learned that two diet technicians were going to lose their jobs.

#### 5. The Respondent’s postlayoff staff

After the August–September 1994 terminations and at least until the June 1995 hearing, the Respondent retained only one employee (Sueno) with the job title of diet technician. When asked during the June 1995 hearing how the function was handled without Zimmerman’s presence, Kirk replied, “Several ways. The administrative dietician [Schwartz] plays a role in handling those tasks. Dieticians would handle some of the tasks and food service workers handle some of the clerical issues.” At the end of January 1995, the Respondent hired Ayashaia (Ann) Gardner and gave her the job classification of “Food Service Aide I.” At least by April 1995, she was performing solely diet technicians’ work. In April 1995 and during the first 2 weeks of May 1995 (the last period for which her weekly hours are shown by the record), she averaged about 21 hours per week. Schwartz testified in mid-June 1995 that Gardner was working about three full weekend shifts a month. Kirk and Schwartz testified in June 1995 that Gardner had been more active in the diet office recently because Schwartz was getting ready for an inspection (conducted every 3 years by the Joint Commission for Accreditation), which in September was to extend to the food and nutrition department; and that when that inspection was over, Schwartz would resume her duties in that office and

Gardner would return to the kitchen. Schwartz further testified in mid-June 1995 that employee Elena Grafilo had been classified as a diet technician until about late February 1994, had been transferred to a computer project about early February and reclassified as a computer coordinator about late February, and on a date which (Schwartz testified) she could not recall, began to help out in the diet office one full shift a month and, up to twice a week, between 2 and 3:30 p.m. “If the census warrants it.” In connection with the “rightsizing,” 12 employees were shifted from full-time to part-time status. So far as the record shows, Zimmerman was not offered this option.

Kirk testified that before discussing with True the number of hours involved in reducing Kirk’s department—a discussion which, according to Kirk, took place “prior to, somewhere around that, the final receipt of the ranking” (Zimmerman’s rating was approved on August 23, her ranking was dated August 16, and it was approved on August 29), “the [FTE] target in Kirk’s mind” was 8, and that he lost 8 FT’s from his department. He testified that in addition to losing the two terminated full-time diet technicians, he lost two early retirement cooks; at least one terminated cafeteria employee; at least one (probably more than one) terminated kitchen employee; and four or five terminated part-time employees. The record fails to show how many FTEs were represented by the terminated part-time employees, or whether the terminated part-time employees were among any of the terminated employees (other than diet technicians) referred to in the preceding sentence. Company counsel stated in his oral argument at the close of the hearing that “12 [of the terminations and early retirements] came out of the food and nutrition department” headed by Kirk—namely, two cooks, . . . the two diet technicians and seven or eight I believe it was came from food services.” the Respondent’s answer avers that “the restructuring of the Respondent’s Food and Nutrition Services function . . . resulted in the reduction of the number of full time employee positions from 49 to 35.” More than one of the employees included in the layoff had 30 or more years of service with the Respondent, as compared to Zimmerman’s 24 years.

An August 1994 “Rightsizing” memorandum states that a total of 126 employees were reduced through the early retirement incentive program and the subsequent reduction in force; and that additional reductions in budgeted hours for part-time employees resulted in a total reduction of 129 FTEs.

#### 6. Procedures called for by the “Rightsizing Process” after completion of the RIF ratings

Before being terminated, Zimmerman had been employed as a diet technician in the “dietary department,” whose job classifications also included dieticians and food service workers; the “dietary department” was part of the “food service department,” whose job classifications also included cooks, chefs, and tray line workers. At the time of the hearing, in June 1995, there were about 45 persons in the food service department. The “Rightsizing Process” memorandum delivered to the managers in early August directed them to prepare a “Step 2—Ranking” after completing the “Step 1—Rating” process. These instructions stated, in part (emphasis in original):

<sup>20</sup> For reasons not shown by the record, no entry appears after the blank calling for “Human resources approval” on Hargrove’s or Sueno’s rating sheets (R. Exhs. 16 and 17). The ranking sheet (R. Exh. 18) suggest that “Human resources approval” was signed by Descher on August 23 (see supra, fn. 18) and by House on August 29.



Once all the employees have been rated, you must rank them (#1/highest) in order of those most critical to the department after the reduction-in-force.

. . . .

Your ranking will be based on:

- (1) skills and abilities applicable to *departmental needs going forward*
- (2) performance as indicated by the rating score, and
- (3) *if these are equal*, length of hospital service.

The attached "Ranking" form contains blanks for the name and job title of each employee, but no blank calling for the employee's RIF rating, and states, "Rank order, starting with those employees whose performance and job skills are most critical."

The instructions went on to say:

A *second-level review* will be made by Director and/or Senior Executive. This step will include their review of both the ratings and rankings you developed, plus the employee's past performance evaluation scores. Once the Senior Executive has approved, the "Affected Employee List" should be created.

#### Step 4—Layoff List

The Senior Executive will summarize all of their "Affected Employee Lists" into preliminary "Layoff List [sic]" for each department or job title, whichever is appropriate.

I infer that at least one purpose of the requirement for a "Step 2—Ranking" was to make sure that the employees to be retained would be able, as a whole, to perform all of the functions of the department in question.<sup>21</sup> So far as the record shows, no "Step 2—Ranking" form was ever filled out which included diet technicians plus other job classifications. Only the three diet technicians (Zimmerman, Hargrove, and Sueno) are listed on a "Ranking" form, which was filled out by True, signed by him with the date August 16, approved by Beverly Tuck (Respondent's senior executive for support services) on August 23, and signed by House on August 29.

#### 7. Incidents allegedly reflected in the RIF ratings

The job description of diet technician effective before May 1995 includes the requirement: "Maintains excellent guest relations. Is considerate and respectful of patient's needs." Kirk testified that he gave Zimmerman a relatively low rating on "Guest Relations" because of a patient complaint directed to her. Schwartz credibly testified as follows: On the morning of March 28, 1994, a patient on a restricted diet complained to Schwartz that as to the meal served on the previous day (when Zimmerman was not on duty), the potato was undercooked, the turkey was too dry, and the sherbet was melting. The patient went on to say that in her state, there was a lot of food that she could not tolerate; that she did not want anything on the menus for the lunch and dinner

to be served that day; that she was not given any alternates; and that when she started to complain to Zimmerman about not wanting anything on the menu, Zimmerman was "flip-pant," walked out as the patient was talking, and did not give her an alternative menu sheet. Schwartz got the patient an "alternative entree" for lunch, and received no more complaints from her. Later that day, Schwartz stated to Zimmerman that Schwartz agreed that the patient was a difficult and very sick lady, but that the diet department personnel were there for the very purpose of handling situations like that. Schwartz further told Zimmerman to remember that the patient is almost always right, and to offer a complainant the resources that the Respondent had (in this instance, the alternative menu list) to try to solve the complaint.

At Kirk's "advice," Schwartz prepared, and arranged to include in Zimmerman's personnel file, a form captioned "Record of Disciplinary Action" which at least purports to summarize this incident.<sup>22</sup> Notwithstanding Schwartz' testimony about what she told Zimmerman in connection with this incident, the form contains, in the paragraph calling for "Expectation/Warning given at this time," the following underscored entry; "Further violations of the Hospital policy against conduct which might embarrass patients/personnel/visitors could result in further disciplinary action." Schwartz testified that she documented this incident, and placed the document in Zimmerman's file, because this incident "is a severe infraction of hospital policy." No check mark appears before any of the three choices at the top of the form ("Verbal Warning/Counseling," "Written Warning," or "Suspension"). Although the form calls for a dated signature by both the employee and the supervisor, the document in Zimmerman's file contains neither. Schwartz did not recall presenting the form to Zimmerman, did not ask her to sign it, and did not tell her that it was being placed in her personnel file. Nor did Kirk suggest that Schwartz take such action. Schwartz testified that Kirk "asked if I had discussed it thoroughly with her and I had, so it was placed in her file as a written note . . . it was not placed there as a written warning." However, Kirk testified that this document "is a record of disciplinary action that records the conversation that took place and what the incident consisted of. This would be placed in [the] file for two purposes, for further disciplinary tracks if needed, but also for appraisals." According to the credible testimony of Schwartz, who when she testified had been working for the Respondent as administrative dietician for about 16 months, Kirk had never on any other occasion advised her to place a written disciplinary warning in an employee's file, nor had she ever done so on her own initiative, even though the dry-turkey incident was not the first time that a guest had complained about an employee. After asking Kirk about this incident, the Respondent's counsel asked Kirk about two anonymous telephone calls which on February 13 and/or 14 the Respondent received via its "hot line," both of which complained about lack of service by the the Respondent's "dieticians"—a word which, Kirk testified, was commonly used to refer to anyone who works in the diet office. The Respondent never

<sup>21</sup> For example, certain functions must be performed by a licensed dietician. Accordingly, at least one licensed dietician would have to be retained even if the RIF ratings of all dieticians were lower than those of anyone else in the department.

<sup>22</sup> Schwartz' entries on the form state, inter alia, that Zimmerman told the patient that the only meal choices were the ones on the printed menu. Schwartz testified, in effect, that Zimmerman failed to tell the patient about the alternative menu.

did find out who made these calls or at whom these complaints were directed. Kirk testified that Zimmerman had received no compliments from guests, whereas Sueno and Hargrove had each received an undisclosed number of oral compliments (undocumented in the Respondent's records) for "going out of their way to deliver some kind of stranger patient requests."

Kirk testified that the factor "Guest Relations" on the rating sheets "would have pertained to staff relationships as well as patients." As to this factor, he wrote on her rating sheet, "Have had problems in . . . visitor and staff relations." He testified that he gave Zimmerman a relatively low rating on this factor partly because of oral and undocumented complaints from unit clerks on cooperation, and partly because of undocumented complaints, whose nature he was not asked, from visitors.

#### 8. Other incidents

On February 24, 1994, Schwartz conducted a meeting which was attended by, among others, Kirk, Sueno, and Hargrove, but not by Zimmerman, who was not on duty that day. Among the matters discussed was the at least alleged conduct of Zimmerman and Hargrove in changing their work schedules on their own accord without going through Schwartz. The typed agenda for that meeting states, in part, "If you must call in an absence, please do so as far in advance as possible. Please notify Carol Schwartz." The parties stipulated that on March 2, Schwartz reviewed the "agenda topics" with Zimmerman. The record otherwise fails to show whether Zimmerman was advised about the schedule-change matter; at the hearing, neither she nor Schwartz was asked about this. Thereafter, on a date not clear in the record, Schwartz issued a work schedule for May 8 through June 4, 1994. Schwartz testified that she did not work on May 7 or 8. When she returned to her office on May 9, she found on her desk a copy of the May 8-June 4 schedule issued by her, with changes entered thereon for May 9 and June 2-4 and with the following handwritten note from Zimmerman: "Carol, Please note changes/sorry." In accordance with the changes which Zimmerman had entered on the schedule, she reported to work on May 9, which Schwartz had scheduled as a holiday for Zimmerman (perhaps at Zimmerman's request) at 5:30 a.m., which was her usual reporting hour but was an hour and a half or more before Schwartz' scheduled reporting hour. At least as to the changes entered by Zimmerman for June 2-4, Schwartz testified, "I think we worked it out." As expressed at the hearing, Schwartz' dissatisfaction with Zimmerman's conduct was not with any request by Zimmerman for a schedule change after the schedule had been made out, but that "it is the only time an employee had the audacity to make the changes and put it on my desk." Kirk testified that after the February 24 meeting, the problem of employees' changing shifts "never really ceased." After inspecting the exhibit which is a photocopy of the schedule which Zimmerman had left on Schwartz' desk, Kirk testified that it "appears to be a change in the schedule on [Zimmerman's] own wishes without talking to the supervisor." The record fails to show whether Kirk knew about this May-June incident at any material time.

Schwartz maintained a daily diary in which she noted errors or performance deficiencies, mostly those about which

the employee had been previously counseled. Between March 2 and July 11, 1994, Schwartz made nine such entries naming Zimmerman, in addition to entries regarding the previously discussed dry-turkey incident.<sup>23</sup> As to the significance of these entries in connection with Zimmerman's rating, the Respondent's posthearing brief contains the following accurate summary of Kirk's and Schwartz' testimony (pp. 10-11), "While Mr. Kirk did not solicit input from Ms. Schwartz when he prepared the ratings . . . she was asked to review the ratings and she concurred with them."<sup>24</sup>

One of Schwartz' diary entries noted that on June 3, Zimmerman had failed to comply with State requirements to wear a hair net when working in food preparation areas. Schwartz had also reproached other diet-office employees for not wearing a hair net in the kitchen area. A May 11 entry states that Zimmerman had issued future menus in a manner and at a time which may have interfered with three patients' opportunity to select their own breakfast.

The other entries naming Zimmerman reflected conduct about which Zimmerman had been orally counseled once or twice previously. These entries referred to March 2 and June 20<sup>25</sup> failures to file the menus for all the patients before leaving for the day (conduct in which "all the staff" engaged, although Schwartz testified that she did not recall speaking to any other diet technicians about the matter);<sup>26</sup> a March 2 failure to make a calorie count;<sup>27</sup> a March 2 sign-out notation that she had left later than she in fact left, a March 7 failure to comply with instructions to enter on a production sheet an order for an orange which was to be quartered because the arthritic patient was physically unable

<sup>23</sup> This figure does not include Schwartz' April diary, which was removed from her desk that month by an unknown person or persons.

<sup>24</sup> Respondent's brief also contends that the "sheer number" of "these repeat" incidents set forth in the diary "suggests that [Zimmerman] must have believed that she was somehow exempt from the rules and procedures," and that Kirk's rating of "4" for Zimmerman's Quality of Work "may have been overgenerous in view of his unfamiliarity with Ms. Schwartz' diary" (pp. 10-11). I fail to perceive the materiality of these arguments in view of Kirk's testimony that the "evaluation form" was the "sole consideration" in making "these evaluations or rankings," and the Respondent's contention that the decisions about whom to terminate "were based solely on" the RIF rating forms (p. 11).

<sup>25</sup> These and the dates subsequently mentioned in this paragraph are the dates of the entries, not the dates of the incidents.

<sup>26</sup> These were the menus on which the patients had indicated their food choices for the meals to be served on a particular day. Sometimes no such annotated menu would exist for a particular patient, because the patient had been admitted after distribution of the unannotated menus, had been undergoing tests outside his hospital room when the unannotated menus were distributed, or had had his diet changed by his doctor after the patient had annotated his menu. Schwartz' testimony at least suggests that Zimmerman had a practice of listing the unfiled menus. Schwartz testified that the number of unfiled menus listed by Zimmerman exceeded the number which had been set by Schwartz' predecessor as a standard maximum, and that for this reason, Schwartz had concluded the number of unfiled menus to be excessive. After the layoff, Schwartz instituted a new policy of filling out the menus for patients who, for the reasons previously indicated, could not fill out the menus themselves. Thereafter, the number of unfiled menus substantially dropped.

<sup>27</sup> As of the June 1995 hearing, failures to make calorie counts continued to be a problem.

to quarter it herself, a March 10 failure to thoroughly check off for drug and alcohol dependency patients certain caffeine-containing items which such patients should not receive, a June 22 uncovered absence from the office for 35 minutes for reasons not shown by the record,<sup>28</sup> and, on July 11, signing out 15 minutes before the scheduled end of the shift.<sup>29</sup> In addition, Schwartz spoke with Zimmerman at least four times during April 1994 (see *supra*, fn. 23) about accuracy, and “following through the procedures of the department.”

Because of Zimmerman’s work schedule, Schwartz testimonially attached to Zimmerman two reproofs as to whom Schwartz’ diary does not name the employee. One of these was a March 29 failure to put a calorie-count sticker on a breakfast tray. Because Zimmerman was not asked about this incident, I infer that she was in fact the employee who was responsible for it. The other incident involved a failure to make sure that snacks were available for all diabetic patients. On direct examination, Schwartz testified that on July 8, she discussed the importance of this duty with Zimmerman. Zimmerman was not on duty on July 8. On cross-examination, Schwartz denied counseling Zimmerman about this incident. In view of these inconsistencies, I infer that any neglect was not attributable to Zimmerman.

Schwartz also orally counseled Sueno about certain errors, but she did not repeat them and they are not noted in Schwartz’ diary.<sup>30</sup> In addition, Schwartz orally counseled Sueno about her poor handwriting. Although Sueno’s handwriting remained “terrible,” Schwartz’ diary does not refer thereto. The job description for diet technician in effect until May 1995 states, “Must be able to write legibly.” There is no evidence that Sueno’s poor handwriting affected the quality of her job performance.

Schwartz also testified about diary entries she made regarding Hargrove. I see no reason to spell out these entries in detail.

#### D. Analysis and Conclusions

##### 1. The independent 8(a)(1) allegations

My action in discrediting employee Thomas’ testimony about remarks allegedly made by Supervisor Smith calls for dismissal of the complaint allegation that the Respondent, through Smith, threatened employees that other employees were selected for discharge because of employees’ union activities.

<sup>28</sup> Schwartz later constructed a chart which held each diet technician accountable for covering the office for certain hours. Schwartz testified that diet technicians other than Zimmerman failed to cover the office on some occasions, but that Schwartz developed the chart “particularly” for Zimmerman.

<sup>29</sup> Schwartz’ diary entry as to her counseling of Zimmerman in connection with this incident states, “Talked to [Zimmerman] about 5 a.m. and leaving early—1:45 p.m.” Schwartz testified that she counseled Zimmerman both about leaving at 1:45 p.m. and about her practice of beginning work at 5 a.m. instead of her scheduled hour of 5:30 a.m. The record fails to show the hour when Zimmerman in fact began to work on the day in question; she was not asked about this matter.

<sup>30</sup> These included a failure to record calorie counts, a “serious offense” (according to Schwartz) for which the whole staff was counseled, and failure to make a “positive” reply when a patient wanted a late lunch tray and hot food was no longer available that afternoon.

However, I agree with the General Counsel that the Respondent violated Section 8(a)(1) when the Respondent, through Executive Chef Mitchell, unqualifiedly told employee Zimmerman not to talk to “his cooks” about the “union stuff.” *NLRB v. Rich’s Precision Foundry*, 667 F.2d 613, 621–622 (7th Cir. 1981); *Eastern Steel Co.*, 253 NLRB 1230, 1238 (1981), *enfd.* 671 F.2d 104 (3d Cir. 1982); see also *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491–493 (1978); *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974).<sup>31</sup>

##### 2. Zimmerman’s termination

As the Respondent does not appear to question, an employer who has decided for lawful economic reasons to diminish the size of his work force violates Section 8(a)(3) and (1) of the Act by selecting an employee for inclusion in the layoff because of his union activity. *Sonicraft v. NLRB*, 905 F.2d 146, 149 (7th Cir. 1990), *enfg.* 295 NLRB 766, 783–788 (1989); *Potential School for Exceptional Children*, 282 NLRB 1087, 1091–1092 (1987), *enfd.* 883 F.2d 560 (7th Cir. 1989); *Turnbull Cone Baking Co.*, 271 NLRB 1320, 1355 (1984), *enfd.* 778 F.2d 292 (6th Cir. 1985), *cert. denied* 476 U.S. 1159 (1986), *W. C. McQuaide, Inc.*, 319 NLRB 756, 756 fn. 2, 785–786 (1995); *Knoxville Distribution Co.*, 298 NLRB 688 (1990), *enfd. mem.* 919 F.2d 141 (6th Cir. 1990). I conclude that the evidence preponderantly shows that Zimmerman’s union activity was at least in part the reason for her inclusion in the August–September 1994 layoffs.

Initially, the record shows that the Respondent strongly opposed the Union, and that the Respondent knew about and resented Zimmerman’s union and perceived union activity. Thus, while Zimmerman was distributing union authorization cards in support of the union campaign initiated by her in the fall of 1995, Supervisor Smith told her that Smith had heard rumors that Zimmerman had union cards and that she had better be careful. Further, during that campaign she kept a union mug on her desk and hung a 6-inch union button over her desk. Moreover, during director of support service True’s May 7 speech to a number of employees in the presence of Food and Nutrition Operations Manager Kirk, in an effort to induce employees to vote against the Union, Zimmerman openly disputed True’s assertion that the Union wanted a lot of money, openly expressed the opinion that a union at UCH had improved employees’ working conditions, and openly disputed True’s assertion that the Respondent and UCH were not connected in any significant respect. These publicly expressed views by Zimmerman not only caused True to redden and to turn his back to her, but may have led to a letter to the employees from the Respondent’s chief executive officer asserting that UCH and the Respondent were significantly different. Further, on inferring that Zimmerman had posted a prounion flier on “his” bulletin board, Executive Chef Mitchell caused administrative dietician Schwartz to tell Zimmerman not to do this again; hit her on the back; referred to his message in scatological terms; told her not to give “his” cooks “union stuff” or to talk to them about it; and ascribed a perceived estrangement between her and him to her involvement with the Union, which he described in scatological terms. During the representation elec-

<sup>31</sup> The complaint does not allege that the Respondent violated the Act by forbidding the distribution of union literature.

tion, at which Zimmerman was the only employee to act as union observer for both sessions, Supervisor Smith responded to Zimmerman's questions about her nonreceipt of an antiunion letter from management by remarking, "Well, we know where you stand with the Union, so what does it matter?" By letter to Zimmerman dated June 3, 1994, after the Union had lost the May 12 election, the Respondent denied as to the Respondent's antiunion campaign certain allegations in a May 13 letter from her to UCH management. About 2 weeks later, Executive Chef Mitchell told Zimmerman that he was tired of his supervisors' complaining to him about her and the Union. When Kirk telephoned Zimmerman about the matter, Zimmerman repeated to Kirk Executive Chef Mitchell's remark about "his supervisors'" complaints about her and the Union, said she was afraid of Mitchell, and asked that any dealings between her and Mitchell go through Kirk or Schwartz. Indeed, when after Zimmerman's termination she visited the Respondent's establishment to pick up her final checks, Mitchell remarked, "Oh, is [Zimmerman] here to sell that union [scatological term] again?"

Finally, the Respondent's own evidence shows that Zimmerman's termination was not a mere incident to the August–September 1994 layoffs directed toward a relatively permanent reduction in the size of the Respondent's entire work force; rather, such evidence shows that the lawfully motivated mass layoff was used by the Respondent to conceal its reasons for terminating Zimmerman. Thus, Carol House, who is the Respondent's vice president senior executive for support services, credibly testified that until the Respondent had the results of the early retirement incentive program, no determination could be made about how many employees would be lost by layoff in each specific category. The period within which eligible employees could apply for early retirement did not expire until August 29. However, the testimony of Administrative Dietician Carol Schwartz, even when considered in light of dates on the RIF rating sheets and on the ranking sheet authenticated by the Respondent's witnesses, shows that director of support services True knew, no later than August 23 and (probably) earlier than that, that two diet technicians were going to be terminated, and that these would be Hargrove and Zimmerman. True relayed this information to Schwartz after he and Kirk had signed the three diet technicians' RIF rating sheets and dated them August 14, and after True had signed the ranking sheet and dated it August 16, which documents showed that in order to reach Zimmerman in a manner at least arguably consistent with the rules to be followed in determining after August 29 the individuals to be laid off and their distribution among the various job classifications, the Respondent would have to terminate two of its three diet technicians. When considered in light of the Respondent's animus against unionization in general and union activist Zimmerman in particular, and in light of supervisor Smith's warning to Zimmerman that she had better be "careful" in view of reports to Smith (which were accurate) that Zimmerman had union cards, the evidence that the Respondent reached its decision to terminate Zimmerman before it had enough information to determine the number, job classifications, and identity of the employees who would be included in the layoff for lawful economic reasons constitutes persuasive evidence that her union activity was at least a motive for her termination. "False defenses become a two-edged sword in that they may serve to support an ulti-

mate inference of unlawful motive." *Western Plant Services*, 322 NLRB 183, 194 (1996); see also *Whitesville Mill Service Co.*, 307 NLRB 937 (1992).

Other evidence casts further doubt on the honesty of the Respondent's explanation for Zimmerman's termination. Thus, although the Respondent admits (in effect) that Zimmerman would not have been terminated if management had not decided to terminate as many as two diet technicians, the Respondent not only failed to call as a witness a member or members of management to testify that they were responsible for making this decision and to explain why they made it, but also failed to call as a witness anyone who would identify the management personnel who made this decision.<sup>32</sup> Further, although the "Rightsizing" instructions and forms obviously contemplated that the rankings were at least ordinarily to consist of more than a list of employees in each job classification in the order of their RIF ratings, and also contemplated that the rankings would override the ratings, the record is silent as to why the "ranking" list for diet technicians is limited to them. Further, the Respondent's conduct in connection with the dry-turkey incident, which according to Kirk affected Zimmerman's relatively low rating as to "guest relations," shows a number of peculiarities. Thus, Schwartz' entry on the form purporting to set forth the reproof given to Zimmerman in connection with this incident is much sharper than the oral reproof which Zimmerman received according to Schwartz' own testimony. Further, the reproof as described in the form is inappropriate for the offense as described in the form; more specifically, the form alleged that she had engaged in "flippant" conduct, had walked out in the middle of her conversation with the patient, and had inaccurately described to the patient the normal hospital policy as to menus unsatisfactory to a particular patient, but further stated, in effect, that Zimmerman's conduct "might embarrass patients/personnel/visitors." In addition, and contrary to the procedure called for by the form, Zimmerman was not presented with it, and there is no evidence that she saw it at any material time. Moreover, Schwartz' descriptions of the incident in the form and on the witness stand are somewhat inconsistent. Further, although the Respondent did shift some of the other employees under Kirk from full-time to part-time positions, there is no evidence that this option was made available to Zimmerman, or that she was ever offered such a part-time job after her August 31, 1994 termination, even though the Respondent subsequently transferred two employees (one of them hired after Zimmerman's termination) with other job classifications to work as diet technicians on a part-time basis. Likewise somewhat peculiar are certain interpretations which Kirk allegedly placed on the rating form and which disadvantaged Zimmerman. Thus, Kirk testified that he interpreted the term "Guest Relations" to include relations with other members of the Respondent's staff and with visitors, and that in rating Zimmerman as to this factor he relied on her at least alleged noncooperation with unit clerks and on undocumented and unspecified complaints from visitors. Moreover, Kirk testi-

<sup>32</sup> That even a good-faith decision as to the number of diet technicians (if any) to include in the layoff would have been to at least some extent a matter of judgment is shown by the evidence that food service workers and diet technicians have performed some of the same work, and diet technicians and dieticians have performed some of the same work.

fied that as to the RIF rating category which read "Job-related experience/education," Sueno received a higher rating than Hargrove or Zimmerman because, although Hargrove and Zimmerman exceeded her as to job skills and as to the ability to pick up new skills and instructions, "we" looked only at formal training in the dietetics field because "we needed . . . someone who can work multi-faceted." Furthermore, although Supervisor Smith was admittedly aware that Zimmerman had received additional training in the dietary field, and although the instruction sheet had directed Kirk not to use educational background as a basis for rating any employee if information as to this factor was not available for one employee, Kirk nonetheless used educational background in rating all the diet technicians, and the RIF ratings prepared by Kirk gave Zimmerman (and Hargrove) a relatively low score as to "job-related experience/education" for the express reason that they had "no formal training/education." In addition, the record is silent as to why "human resources" noted its approval on Zimmerman's RIF rating sheet but not on Sueno's and Hargrove's rating sheets.

Because the evidence thus preponderantly shows that Zimmerman's union activity was a motivating reason for her termination, her termination violated Section 8(a)(1) and (3) unless the Respondent shows, by a preponderance of the evidence, that she would have been terminated even in the absence of her union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398-403 (1993); *NLRB v. Advance Transportation Co.*, 979 F.2d 569, 573 (7th Cir. 1992); *NLRB v. Advance Transportation Co.*, 965 F.2d 186, 190-191 (7th Cir. 1992); *NLRB v. Bestway Trucking*, 22 F.3d 177, 180 (7th Cir. 1994); *KNTV, Inc.*, 319 NLRB 447, 452 (1995); and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The Respondent has failed to make such a showing. More specifically, the Respondent has failed to show that it would have terminated Diet Technician Zimmerman if it had waited until after the August 29 early retirement deadline (as the Respondent did with respect to the lawful economic lay-off) to ascertain the size of the remaining work force and their distribution between job categories and between full-time and part-time status, and had then determined without regard to Zimmerman's union activity how many Diet Technicians (if any) to include in the layoffs.

For the foregoing reasons, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating Barbara Zimmerman.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act by telling an employee not to discuss the Union with other employees.
4. The Respondent has violated Section 8(a)(1) and (3) of the Act by terminating employee Barbara Zimmerman.
5. The unfair labor practices set forth in Conclusions of Laws 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. The Respondent has not violated Section 8(a)(1) of the Act by threatening employees that other employees were selected for discharge because of employees' union activities.

#### THE REMEDY

Having found that the Respondent has violated the Act in certain respects, I shall recommend that the Respondent be required to cease and desist from such conduct, or like and related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, the Respondent will be required to offer Zimmerman reinstatement to her former position or, if no such position exists, to a substantially equivalent position, and to make her whole for any loss of earnings and other benefits she may have suffered by reason of her unlawful termination, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent will be required to remove from its records (1) all references to Zimmerman's unlawful termination; (2) the memorandum in her file which includes the date of March 28, 1994, and is captioned "Record of Disciplinary Action"; (3) her RIF rating sheet dated August 14, 1994; and (4) the ranking sheet including her name and dated August 16, 1994; and to notify her in writing that this has been done and that the actions and matters reflected in these documents will not be used against her in any way. Also, the Respondent will be required to post appropriate notices.

On the basis of these findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended<sup>33</sup>

#### ORDER

The Respondent, Louis A. Weiss Memorial Hospital, Chicago, Illinois, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Telling employees not to discuss unions with other employees.

(b) Discouraging membership in Warehouse, Mail Order, Office Technical, and Professional Employees Union, Local 743, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization, by terminating employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Barbara Zimmerman full reinstatement to her former position or, if this position no longer exists, a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

<sup>33</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files (1) all references to Zimmerman's unlawful termination; (2) the memorandum in her file which includes the date of March 28, 1994, and is captioned "Record of Disciplinary Action"; (3) her rating sheet dated August 14, 1994; and (4) the ranking sheet including her name and dated August 16, 1994; and within 3 days thereafter, notify her in writing that this has been done and that the action and matters reflected in these documents will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 13, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."<sup>34</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Paragraph V,b of the complaint is dismissed.

<sup>34</sup>In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell you not to discuss unions with other employees.

WE WILL NOT discourage membership in Warehouse, Mail Order, Office Technical, and Professional Employees Union, Local 743, International Brotherhood of Teamsters, AFL-CIO, or any other union, by terminating you, or otherwise discriminating in regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Barbara Zimmerman reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Barbara Zimmerman whole, with interest, for any loss of earnings and other benefits she may have suffered by reason of her termination.

WE WILL, within 14 days from the date of the Board's Order, remove from our files (1) all reference to Zimmerman's unlawful termination; (2) the memorandum in her file which includes the date of March 28, 1994, and is captioned "Record of Disciplinary Action"; (3) her rating sheet dated August 14, 1994; and (4) the ranking sheet including her name and dated August 16, 1994, and WE WILL, within 3 days thereafter, notify Zimmerman in writing that this has been done and the actions and matters reflected in these documents will not be used against her in any way.

LOUIS A. WEISS MEMORIAL HOSPITAL